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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 370.

MARIAN S. HONEYMAN,

Appellant,

—against—

HERBERT G. HANAN, as Executor of the Last Will and Testament of Herbert W. Hanan, Deceased,

Appellee.

BRIEF OF AMICUS CURIAE.

WILLIAM GILLIGAN,
Amicus Curiae.

THE COURT PRESS, N. Y. C.

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BRIEF OF AMICUS CURIAE.

Summary.

This brief urges that under conditions existing in 1933, when mortgagees in foreclosure actions invariably became the purchasers upon a sale of the mortgaged property, the New York Supreme Court, having been endowed with the powers of the English court of chancery, was competent to decree that the reasonable and fair market value of the property be credited against the mortgage indebtedness; that there was implicit in mortgage contracts previously made, a reservation subjecting the contracts to the possible exercise of this power, and that in decreeing the manner in which the power should be exercised, the New York Legislature merely gave effect to the implied reservation and did not impair the obligations of the contract.

POINT I.

The provisions of Chapter 794 New York Laws, 1933, do not impair the obligations of contracts.

In order to determine whether the statute of which the appellant complains is unconstitutional as impairing the obligations of contract, it is necessary to determine what these obligations were. They are not to be found within the four corners of the written instrument itself, but necessarily comprehend all the rules of law and principles of equity which existed in the State of New York at the time the contract was made.

> "* * * Into all contracts, whether made between States and individuals, or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and the higher authority of the laws of nature, of nations or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur."
>
> *Long Island Water Supply Company* v. *Brooklyn* (1896), 166 U. S. 685-92;
> *Home Building and Loan Association* v. *Blaisdell* (1933), 290 U. S. 398-435.

Thus, there was implicit in the several instruments constituting the mortgage contracts now before the

Court, the principles of equitable jurisprudence, obtaining in the State of New York at the time the contract was made. These principles were those developed in the English courts of Chancery, with the exceptions, conditions and limitations created by the New York Constitution and the statutes of the Legislature.

The first constitutions adopted by the State of New York in 1777 and 1822 assumed by reference the existence of a Supreme Court with general jurisdiction in law and a separate court of chancery (II Lincoln Constitutional History of New York 151). The revised statutes of 1830 (5th Ed. Pt. III, Ch. 1, Tit. 2, Art. 2, §42, p. 264) provided that

> "the powers and jurisdiction of the court of chancery are coextensive with the powers and jurisdiction of the court of chancery in England, with the exceptions, conditions and limitations created and imposed by the Constitution and laws of this State."

Section 3, Article VI of the Constitution of 1846 provided (I Lincoln, *ibid.* 249)

> "There shall be a supreme court having general jurisdiction in law and equity."

the effect of which was to transfer to the Supreme Court the equity jurisdiction of the earlier Court of Chancery. *Sherman* v. *Felt* (1849), 2 N. Y. 186.

This court was continued by the amendment of 1869 (I Lincoln, *ibid.* 285), the amendment of 1879 (I Lincoln, *ibid.* 314), and as Section 1 of Article VI in the present constitution of the State of New York now reads (2 McKinneys Consolidated Laws):

> "the Supreme Court is continued with general jurisdiction in law and equity, subject to such ap-

pellate jurisdiction of the Court of Appeals as now is or may be prescribed by law not inconsistent with this Article."

And Section 3 of the same article provides:

"* * * except as herein otherwise provided, * * * the Legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and in equity that it has heretofore exercised."

This provision first appeared in the constitution of 1846 (I Lincoln, *ibid.* 250) and was included in the amendment of 1869 (I Lincoln, *ibid.* 286).

In the courts of chancery, contracts representing mortgage transactions have always been *sui generis.* And it is elementary learning that the obligations which mortgage contracts purport to establish are subject to the inherent power of chancery to vary or impair them for the purpose of avoiding an abuse of the contract rights by either party and of promoting the ends of justice. The history of mortgages is a succession of cases in which this power has been exercised.

Originally our present mortgage was a conveyance to secure a debt conditioned upon repayment; if repayment was not made, the title became absolute (Littleton, Sec. 332). The chancellor first began setting aside these forfeitures and allowing the mortgagor to redeem, when they occurred from mistakes, accidents or other adventitious circumstances (Cary's Reps. 1, *circa* 1560). Thus began the equity of redemption which thereafter was gradually extended so as to cover all defaults as a matter of course (*Emmanuel College* v. *Evans* (1626) 1 Rep. in Ch. 18), and it was said if necessary to continue unto the "tenth generation" (*Bacon* v. *Bacon* (1639) Tothill, 133). But it became customary for the mortgagee to ask that the chancellor give a decree foreclosing

the right to redeem within a given time (*How* v. *Vigures* (1628) 1 Ch. Rep. 32), or under unusual circumstances to direct a sale of the property (*Booth* v. *Rich* (1684) 1 Vern. 295). Attempts to formulate or phrase the contract so as to escape the chancellor's powers were fruitless because "once a mortgage, always a mortgage" (*Newcomb* v. *Bonham* (1681) 1 Vern. 7). At first merely a right accorded to mortgagors, the right became transferable (*Rosecarrick* v. *Barton* (1672) 1 Ch. Cas. 217) which provoked Chief Justice Hale to complain that "by the growth of equity upon equity, the heart of the common law is eaten out, and legal settlements are destroyed", in spite of which Lord Hardwicke later held the interest of the mortgagor to be an estate (*Casborne* v. *Scarfe* (1737) 1 Atk. 603).

Upon a proper showing of facts, the Chancellor did not hesitate to postpone from time to time the entry of the decree foreclosing the equity of redemption (*Cocker* v. *Bevis* (1665) 1 Chan. Cas. 61); *Lant* v. *Criste* (1719) 5 Bro. P. C. 200; Anon. (1740) Barn. C. 221; *Wakerell* v. *Delight* (1803) 9 Ves. Jr. 36; and *Edwards* v. *Cunliffe* (1815) 1 Madd. 287). Some of these extensions were for as much as 2 years and always appear to have been given on condition that the interest and costs be paid up to date of the various extensions. In *Cocker* v. *Bevis,* it was said at page 63,

> "And it appears that this court has very often in like cases of inevitable necessity, and no wilful default appearing in the party, enlarged the time as to the performance of its decrees."

If a mortgagee foreclosed the equity of redemption and then sued at common law upon a bond "given at the same time for the payment of money", this reopened the equity of redemption (*Dashwood* v. *Blyth-*

way (1729) 1 Eq. Cas. Abr. 317). If he had divested himself of title to the property, his action would be enjoined and the bond deemed to have been paid (*Perry* v. *Barker* (1803) 8 Ves. Jun. 527 and (1806) 13 Ves. 198). But if he still had title to the property it appears that he could sue on the bond, because the redemption was thereby reopened, and by collecting on the bond, the property would be redeemed. (*Took* v. *Hartley* (1784) 2 Bro. C. C. 125, as discussed 8 Ves. Jun. 527). These decisions must be considered in relation to the limitations in England on the rights of a judgment creditor against real estate. (Herman, Law of Executions ed. 1878, §§15 *et seq.*)

In Massachusetts a divergent doctrine developed when it was decided at an early date that a mortgagee who had foreclosed could sue upon the bond for the difference between the amount of the debt and "the value of the land according to appraisement". (*Amory* v. *Fairbanks* (1793) 3 Mass. 562.) This doctrine was adopted by Judge Story, sitting in the Federal Court, in *Hatch* v. *White* (1814) 2 Gallis. 152, after examining the decisions in *Took* v. *Hartley* (*supra*) and *Perry* v. *Barker* (*supra*).

In New York, it became the usual practice for the Chancellor to decree a sale of the property in lieu of foreclosure, and direct that any surplus be paid to the mortgagee, or allow the mortgagee to recover on his bond for any deficiency. The history of the practice was set forth by Chancellor Jones in *Lansing* v. *Goelet* (1827) 9 Cow. 346, where the power of the court to direct a sale was unsuccessfully challenged as being contrary to precedent.

The New York Legislature in 1830 (II R. S. 312, Sec. 57) abolished the action of ejectment by a mortgagee which prompted Chancellor Kent to suggest that

the effect was to transfer to chancery, jurisdiction over the debt as well as the security (4 Kent Com. 9th ed. 185). This suggestion later found expression in *Trimm* v. *Marsh* (1874) 54 N. Y. 599 which established the so-called lien theory of mortgages.

All these steps in the history of the law of mortgages are examples of the manner in which the power of a court of chancery was employed to vary the obligations of a mortgagor or mortgagee for the purpose of avoiding an unjust result. Allowing the mortgagee to redeem, foreclosing the equity of redemption, disregarding all efforts to achieve forfeiture through other means, erecting the mortgagor's rights into an estate, enjoining the mortgagee from suing on his bond, limiting the mortgagee's right on his bond to a difference between the amount of the bond and the value of the foreclosed property, decreeing that the property should be sold, finally converting the mortgage into a mere lien regardless of the form of the contract—each was a step representing a new exercise of power which was never successfully questioned. In every case where the report is sufficient to indicate the reasoning of the court, the question considered was not whether it possessed the power, but whether as a matter of policy or circumstance the power should be exercised.

In *Hatch* v. *White* (*supra*) Judge Story considered the English doctrine of *Took* v. *Hartley* (*supra*) and *Perry* v. *Barker* (*supra*), disagreed with them and, concluding that the court had power to adopt a doctrine more consonant with the conditions in Massachusetts, held that a mortgagee who had obtained the mortgaged property by a decree of foreclosure, could nevertheless sue on the bond for the difference between the amount of the bond and the reasonable value of the mortgaged property. The Court said at page 158:

"We should have thought that natural justice as

> well as the stipulation of the parties would have been better conserved by allowing the creditor every remedy *in rem* and *in personam* until his debt should be completely satisfied. *If, afterwards, he should make an oppressive use of his power by attempting to obtain a double satisfaction, then and not until then, the intervention of chancery by way of injunction would be conscientious and salutory.*"*

In *Lansing* v. *Goelet* (*supra*) the Chancellor in an exhaustive review of English and American cases, constantly emphasized the principle that the court of chancery had the power to adapt its decrees to changing needs; he said at page 370,

> "But it is said that the practice of this court in decreeing the sale of mortgaged premises, when it was introduced, was an innovation upon the course of proceedings in the English court of chancery; and how far it may be so, I propose presently to inquire. But if it was so, it violated no rule of law, but was in conformity to the principles of equity applicable to the contract of debtor and creditor; and this court, therefore, in adopting it, acted up to its own principles, and did no more than mete to the mortgagee the measure of equity to which he was entitled."

and at page 375, after referring to *Mondey* v. *Mondey* (1813) 1 Ves. and B. 223;

> "Here was an assertion by the Chancellor, of the power of the court to depart from the usual course of proceedings, at his discretion, and decree a sale instead of a foreclosure of the mortgaged premises, if the exigencies of the case require it;

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* Italics by counsel.

> and he declared, that notwithstanding * * * the counsel praying for a sale could not produce an instance where it had been done; yet, the chancellor, knowing that he possessed the power, and seeing that justice to the party called for its exercise, very properly determined to grant the prayer for a sale; and declared, that if there was no precedent for it, he would make one. And lamentable, indeed, would be the condition of suitors, if the court was precluded by the mere course of practice from deviating from the beaten track, and moulding the exercise of its legitimate powers, and adopting its decrees to the exigencies of cases as they arise, to accomplish the purpose of equity and justice."

and at page 383:

> "*It is certainly not just to permit the mortgagee to extort a double satisfaction from the mortgagor;* but it is surely unjust to deny him the benefit of an inadequate security towards the payment of the debt, and because he is unwilling to accept it as full satisfaction. To obviate these embarrassments, and to enable him to pursue his remedy at law, without waiving the benefit of his decree, it is desirable to provide some method of applying the value of a pledge to the satisfaction of the debt; and thus to leave him at liberty, if still unsatisfied, to take his remedy against the mortgagor for the deficiency."

The court conceived itself to be justified in granting a decree of sale, though contrary to practice, for the purpose of protecting the mortgagee from injustice; conversely that same power could be used by the court for the purpose of preventing the double satisfaction to which reference was made. The prevailing opinion in the Court of Errors, in affirming the decree of the

chancellor expressly mentioned the reserve power of the court at page 402:

> "In case of any calamity, such as hostile invasion, or extreme sickness prevailing in the place of sale at the time, the court will interfere and postpone it."

Even in *McGowan* v. *Sandford* (1841) 9 Paige 290, the one case which is frequently cited as authority for the proposition that equity will not interfere with a foreclosure sale by reason of economic conditions, Chancellor Walworth did not hold that equity did not have the power to interfere, but only that the facts in the case were insufficient grounds for suspending the sale. He cited as authority *Astor* v. *Romayne* (1814) 1 Johns. Ch. 310, where the Court was asked to delay a sale of mortgaged premises because of alleged fear of invasion during the war of 1812. The court granted a delay of 2 months saying at page 312:

> "If there were sufficient evidence of the existence of an immediate calamity, present or impending, over the city, such as invasion by the enemy or extreme sickness which would suspend all civil business, the court ought to interfere and postpone the sale. But such a case does not exist. The apprehension of danger from the enemy is too slight, from anything that has been shown to the court, to warrant the granting of the motion to any considerable extension."

The maxims of equity are redolent of this power. "Equity will regard that as done which in good conscience ought to be done" (1 Pomeroy on Equity, Sec. 376); "Equity looks at the intent rather than form" (*ibid.* Section 382); "Equity will not suffer a wrong without a remedy" (*ibid.* Section 423); and from the Irish court of chancery: "Equity will not suffer a

double satisfaction to be taken" (Francis, Maxims in Equity).

Such being the power of a Court of Equity, it is necessary to consider the extent to which this power may have been circumscribed by the New York Legislature, as provided in Section 3, Article VI of the Constitution.

At the time when the bond in suit was taken, the statute law relating to mortgages on real property and the foreclosure thereof was contained in Articles 8 and 10 of the New York Real Property Law (Ch. 52, Consolidated Laws); Article 4, Title I, Ch. 14 (Secs. 1626 to 1637 inc.) and Title 9, Ch. 17 of the Code of Civil Procedure, and possibly Rules LX to LXIV inclusive of the Rules of General Practice.

Article 10 of the Real Property Law related to the discharge of ancient mortgages. Article 8 provided for a short form of mortgage, which is permissive but not mandatory, and singularly enough, construes the form to be that of an absolute conveyance with a defeasance clause in essentially the same manner as it has been employed in English law for centuries (Sec. 254). It therefore follows that any limitation which may have been imposed upon the chancery powers of the court must be found in the Code of Civil Procedure and the Rules pertaining thereto.

Title 9, Ch. 17, of the Code of Civil Procedure related to foreclosure by advertisement under a power of sale.

Of the twelve sections in the Code dealing with the foreclosure of mortgages by action, only Section 1626 operated to limit the equity power of the court. That section reads as follows:

> "In an action to foreclose a mortgage upon real property, if the plaintiff becomes entitled to final judgment, it must direct the sale of the property mortgaged * * *."

This section made it mandatory that a mortgagor's rights be foreclosed by sale, and in effect precluded a strict foreclosure. By the decision of *Lansing* v. *Goelet* (*supra*), the court had already committed itself to this method of foreclosure as a general practice, and consequently the statute was in large measure declaratory (*Bolles* v. *Duff* (1871), 43 N. Y. 469). The remaining sections, to the extent that they do not cover secondary matters, operate to extend the jurisdiction of equity over the mortgage indebtedness, which in earlier days had been wholly within the common law jurisdiction. Thus Section 1627 provides that persons liable on the mortgage debt whether or not they were interested in the mortgaged property, could be made parties and the court was authorized to enter judgment against them for any deficiency between the mortgage debt and the proceeds from the sale of the property. Although Section 1626 provides that foreclosure *must* be by sale Section 1627 states that the court *may* enter a deficiency judgment, thereby implying that there are cases when it need not enter judgment for a deficiency. The other sections were designed to encourage the assertion of all claims in the foreclosure action, to permit the mortgagor to cure defaults in installment payments, and to dispose of surplus proceeds from a sale.

General Rules of Practice in New York were adopted by the justices of the Supreme Court pursuant to a power conferred by the Code, and were considered to give construction to the statute (*Myers* v. *Feeter* (1850), 4 Pr. Rep. 240). So far as these rules represent an exercise of legislative power, it was possible for them to change the jurisdiction of a court of equity. Rules LX to LXIV inc. have to do with mortgage foreclosures. Rule LXI specifies what a judgment of fore-

closure shall contain. It is mandatory only as to the description of the mortgaged property. Its provisions as to matters affecting substantive law are indirect and expressly made subject to the discretion of the court. This is important and significant because the rule reads:

> "*And unless otherwise specially ordered** by the court the judgment shall direct * * * that the plaintiff or any other party may become a purchaser at such sale."

It is apparent that in drafting this rule any inference that the mortgagee was to have an absolute right of purchasing the mortgaged property at a foreclosure sale was sedulously avoided (p. 16, *infra*).

Thus it is seen that the mortgage transaction in the case at bar occurred at a time when the principles of equity as developed by the English Court of Chancery in relation to mortgages was part of the law of the State of New York, except that the process of foreclosing the mortgagor's rights was limited to a sale as opposed to any other method which equity may have resorted to. On the other hand the power of equity had been extended to include the mortgage indebtedness, and to deal with the mortgaged property *in rem*, that is, by giving a deed to the property to effectuate the sale without requiring execution by the mortgagor and mortgagee.

This broad power of the court of equity has frequently been recognized by the New York Courts.

In *Youngs* v. *Carter* (1877) 10 Hun 194, it was said at page 196:

> "It has been claimed on behalf of the defendants appealing, that this court, as a court of equity, had

* Italics by Counsel.

no power to make the determination which resulted in the judgment, and several authorities were cited and relied upon in support of that proposition. But it will not become necessary to enter into any discussion of them for the purpose of making a proper disposition of this case; for even if it should be conceded that the jurisdiction of the court cannot be enlarged by its own inherent authority, no practical difficulty could result from the concession; for it now extends to all cases of law and equity, by virtue of the provision of the Constitution defining its power (Const. of 1846, art. 6, §3). The authority given, in terms is, 'general jurisdiction in law and equity'; and that, of necessity, includes all cases which may be properly comprehended by established and existing equitable principles. The test of jurisdiction cannot be restricted to the existence of some definite precedent for the action which may be brought. That would destroy the flexibility required to maintain the utility of the court, in the demands necessarily made for the exercise of its authority in new cases always arising out of the enterprises and progress of society. The novelty of the case can form no well-founded objection to the jurisdiction over it, if it falls within the limits of any defined equitable principle. That must constitute the test of the court's authority, and not the existence or absence of precedent for the case over which it may be invoked. Those principles are as broad as the just wants and necessities of civilized society required; and it is scarcely possible to imagine a case in which equitable relief may be proper which they do not include."

In *Graf* v. *Hope Building Corp.* (1930) 254 N. Y. 1, in discussing the equitable power of the court Chief Judge Cardozo said at page 13:

"Let the hardship be strong enough, and equity

will find a way, though many a formula of inaction may seem to bar the path."

Although a majority of the court in that case disagreed with its learned Chief Judge and his dissenting associates, the disagreement was on a question whether the power should be exercised and not whether it existed.

This power could have been applied in the present emergency and identically the same results obtained as have followed the application of Chapters 793 and 794 of the Laws of 1933. The difference would have been that the process of having the court declare the circumstances under which the power should be exercised would have been much slower, with many injustices occurring in the meanwhile. The large number of courts exercising plenary equitable powers and the delay incident to delineating the conditions attending such exercise made it much more expedient for the Legislature to act.

The evil which was to be corrected arose from the fact that the market for real property had become so demoralized there were no actual bidders at the foreclosure sales which the statute required. The only bidder was the mortgagee or his nominee. This permitted the mortgagee solely in his discretion to determine the amount of the deficiency which under ordinary circumstances would be entered against the persons liable for the mortgage debt, and thereby permitted the mortgagee to be the judge of his own cause. He could acquire for a nominal sum, fixed only by his will, a property on which the mortgagor had been compelled to pay taxes determined by a very substantial valuation, and in addition, he could obtain a personal judgment for a sum almost as great as the amount of the mortgage. The problem was quite the same as confronted the Chancellor on previous occasions when mortgagees attempted to foreclose the equity of redemption and then procure

a judgment on their bonds. The results were not only unconscionable, but conditions had made the methods of arriving at them contrary to the most fundamental postulate of our jurisprudence, namely, that a man shall not be his own judge.

This condition was intolerable, and when it had arisen on previous occasions in less acute forms, equity had employed its power to correct it. The idea of delaying a foreclosure while the mortgagee received his interest and costs was not new (p. 5, *supra*), and the idea of preventing a recovery on the mortgage indebtedness of an amount greater than the difference between the debt and the reasonable value of the property had also been given expression (p. 7, *supra*).

So far as the deficiency judgments were concerned, the key to the whole situation lay in the fact that both suitors and courts seem to have assumed that mortgagees had an absolute right to be purchasers at foreclosure sales when such sales were conducted by the court. This weakness in our system of foreclosing mortgages has been pointed out by an English commentator on the various efforts to provide mortgage relief, *R. W. Turner,* 21 Va. L. Rev. 601.

But in New York a mortgagee has no absolute right to become the purchaser in an action to foreclose, neither at the time the appellant's mortgage was delivered, nor at present. Such right as exists, and has existed, has been expressly made subject to the discretion of the court. Rule LXI of the General Rules of Practice (currently Rule 259 of the Rules of Civil Practice) provided that unless the court directed otherwise, the judgment should provide that the mortgagee might be the purchaser (p. 13, *supra*). This provision first appeared in the General Rules of Practice adopted by the

justices of the Supreme Court under the Code of Procedure of 1849, and seems to have reflected the practice which prevailed in the Court of Chancery prior to its merger with the Supreme Court in 1846. It gains special significance from the fact that in 1827 the Court of Errors had decided that a purchase by the mortgagee did not vitiate the sale, *Lansing* v. *Goelet* (*supra*). In England it had been decided that a mortgagee bringing about a sale of the property under a power of sale could not be the purchaser (*Downs* v. *Grazebook* (1817) 3 Mer. 200), which was a rule derived from certain analogies between a mortgagee and a trustee (Jones on Mortgages, 8th Ed., Secs. 2078, 2101 and 2417). Hence, there has always been reserved to the New York courts the power of withholding from mortgagees the privilege of being purchasers at judicial sales foreclosing their mortgages, or of granting such privileges conditionally.

As to the instant case, it would have been competent in the foreclosure action prior to entering its judgment, for the court to have taken testimony as to the intrinsic value of the property, and to have denied to the mortgagee the privilege of being the purchaser at the foreclosure sale at a price less than such valuation. Theoretically, if the mortgagee failed to exercise his limited privilege, and no bid was received for the property, the court could adjourn the sale until such a market had developed as to make a sale possible. As a practical matter, however, the mortgagee would have purchased the property at the minimum price specified in the judgment because otherwise, when the sale occurred, he would have lost the property which constituted his basic security, and would have had in its place only a personal judgment on which he would have no assurance of collection. Conversely, if the mortgagee had first proceeded on his bond and obtained a judg-

ment, and then sued to foreclose, his privilege of being the purchaser could have been conditioned upon his crediting the value of the property against the judgment on the bond. Moreover, the Legislature was free to provide that the action on the bond and the foreclosure action must be prosecuted at the same time and such a statute being purely procedural would not have impaired the obligation of contract. (*National Surety Co.* v. *Architectural Co.* (1912) 226 U. S. 276-283; *Oshkosh Water Works* v. *Oshkosh* (1902) 187 U. S. 437-439; *New Orleans C. & L. R. R.* v. *Louisiana* (1894) 157 U. S. 219-224.)

If the mortgagee did not wish the value of the property credited against the mortgage indebtedness, or to hazard the chance of losing the property entirely through purchase by a stranger, he could have deferred his action to foreclose until the court relaxed its rules by removing the condition from the privilege of being a purchaser.

The results achieved in this manner would have been identical with those obtained under Ch. 794, L. 1933. The procedure varies somewhat but is strikingly parallel. By the statute the condition is imposed on the confirmation of the sale, and the mortgagee is permitted to purchase the property unconditionally. The court determines the intrinsic value of the property after the sale rather than before. If the mortgagee is the purchaser, this value fixes the amount of the credit to which the mortgagor is entitled. If the mortgagee does not bid, and there is no other bid, the statute is silent on what is to be done, and the court would necessarily have to postpone the sale. If, when a sale does take place, the mortgagee does not bid and the property is purchased by a stranger, the court would undoubtedly consider the selling price its market value in determining the credit which should be allowed to the mortgagor.

There remains the question of foreclosures by advertisement under a power of sale (Tit. 9 Ch. 17, Code of Civil Procedure, and currently Art. 17 New York Real Property Law). Section 2394 of this title reads:

> "The mortgagee or its assignee, or the legal representative of either, may, *fairly and in good faith,* purchase the mortgaged property or any part thereof at the sale."

The statute contains no provision for deficiency judgments. It must be strictly construed (*Deutsch* v. *Haab* (1909) 135 App. Div. 756) and although it has been on the books for many years (Ch. 156 Laws, 1808), its provisions are so onerous and technical that the practice has not been generally used and the number of cases construing it is relatively small. By its express terms, the mortgagee may become the purchaser *fairly and in good faith.* Where conditions are such that the mortgagee will inevitably be the only bidder, the sale cannot be made fairly and in good faith because the selling price would be determined only by the whim of the mortgagee. It is within the power of equity to anticipate and prevent a wrong (*Vicksburg Water Co.* v. *Vicksburg* (1902) 185 U. S. 65) and under such circumstances the court could, in defining "fairly" determine the fair value of the premises and enjoin the mortgagee from purchasing them at a lower figure.

It should also be borne in mind that a mortgagee who does not wish to get title to the mortgaged property as a "bargain" invariably has the opportunity of arranging for the rents from the property to be trusteed so that they may not be diverted, and in countless cases this has proved a most satisfactory arrangement for the benefit of all concerned.

If at the time of making the contract sued, on the court had the power by its decrees to modify the

manner of performance, such modification necessarily takes place in pursuance of the terms of the contract and not in impairment of its obligations. The fact that instead of acting on its own motion the court responded to an enactment of the Legislature, when the Legislature has at all times enjoyed the power to alter the jurisdiction and procedure of the court does not make the alteration any more an impairment than if the court acted without suggestion from the Legislature.

In *Doty* v. *Love* (1934) 295 U. S. 64, where the legislature had enacted a statute providing that the court of chancery should do that which the court for many years had been empowered to do, it was said by Mr. Justice Cardozo at page 73:

> "The jurisdiction of the court of chancery to give approval to a settlement by a receiver or other officer did not have its genesis in the Act of 1932, or in the procedure there prescribed. It existed in like measure when the liquidation of the bank was begun in 1930 and for many years before. *Depositors were chargeable with notice of that power and became subject to its exercise in making their deposits.*"*

Similarly in the case at bar, the appellant was chargeable with notice of the power of the court of equity to modify the manner of performing mortgage contracts, and in making the contract the appellant acceded to the possibility of such power being exercised, whether it be activated by the voluntary disposition of the court, or by a declaration of the Legislature.

For these reasons the statute did not impair the obligations of the appellant's contract.

Respectfully submitted,

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Amicus Curiae.

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* Italics by Counsel.